

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DUANE ROYSTER,

Defendant-Appellant.

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UNPUBLISHED

January 8, 2009

No. 280676

Wayne Circuit Court

LC No. 07-006588-01

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was convicted at a bench trial of involuntary manslaughter, MCL 750.321, and first-degree fleeing and eluding, MCL 257.602a(5). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 5 to 15 years' imprisonment for the manslaughter conviction and 10 to 20 years' imprisonment for the fleeing and eluding conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the evidence demonstrated that the initial charge of second-degree murder was excessive and that the overcharge "seriously affected the fairness, integrity or public reputation of the judicial proceedings." Because defendant did not raise this issue at trial, the issue is unpreserved.

This Court reviews the prosecutor's charging decision under an "abuse of power" standard, which is found only if the prosecutor's charging decision is made for reasons that are unconstitutional, illegal, or ultra vires. *People v Barksdale*, 219 Mich App 484, 487-488; 556 NW2d 521 (1996). This Court reviews unpreserved issues under the plain error doctrine. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal should occur only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Courts have a narrow scope of review over the prosecuting attorney's charging decisions. See *Barksdale*, *supra* at 487. The test for prosecutorial overcharging is not whether the prosecutor's choice of charges was unreasonable or unfair, as defendant suggests. *Id.* at 489. A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *Id.* at

488, quoting *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995). In the absence of any claim or evidence of abuse of power in the prosecutor's charging decision in this case, this Court will not question that decision. *Id.* at 489.

Here, defendant does not offer any information or evidence to support his contention that the charges were brought for an unconstitutional, illegal, or illegitimate reason. Therefore, there is no basis for this Court to conclude that the prosecutor abused his power in initially charging defendant with second-degree murder.

Next, defendant argues that the evidence presented did not satisfy the elements of second-degree murder and by failing to grant his motion for directed verdict on the charge, the trial court violated his due process rights.

This Court reviews a trial court's decision on a motion for directed verdict based on a sufficiency of the evidence challenge de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court does not consider whether any evidence existed that could support a conviction, but instead determines whether a rational trier of fact could have found that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Under this deferential standard, the resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

The elements of second-degree murder are "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Defendant's motion for directed verdict was based on his lack of malice or intent to commit the charged crime.

"Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998), citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). "Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998), citing *Aaron*, *supra* at 729.

In this case, the evidence showed that defendant had been arguing with a group of people outside a gas station. When the police arrived, he drove off at a high rate of speed, ignoring traffic signs and signals and the lights and siren of the police cruiser. In an effort to elude the police, defendant drove the wrong way down a highway ramp at excessive speeds, hitting and instantly killing the victim in a head-on collision. These actions could be found to have exhibited the willful and wanton disregard of the likelihood that the acts would result in death or great bodily harm. Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to establish the elements of second-degree murder.

Next, defendant contends he is entitled to a new trial because the verdict was against the great weight of the evidence.

To preserve a claim that the verdict is against the great weight of the evidence for appellate review, the defendant must raise the issue in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Here, defendant failed to raise this issue at trial. Accordingly, the issue is not preserved. See *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Thus, this Court should review defendant's claim for plain error affecting his substantial rights. *Musser, supra*.

Challenges predicated on a great weight of the evidence claim are reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage for the verdict to stand. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Defendant was convicted of involuntary manslaughter and first-degree fleeing and eluding police. Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty. See *People v Heflin*, 434 Mich 482, 507-508, 456 NW2d 10 (1990). First-degree fleeing and eluding, as applied in the context of this case, required that defendant willfully refused to obey the visual or audible signals of the marked police vehicle to stop his SUV, resulting in the death of the victim. MCL 257.602a(1) & (5).

Despite the presence of defendant's conflicting testimony in this case, the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon, supra* at 627. The evidence showed that defendant had been arguing with a group of people and that, when the police arrived, he drove off at a high rate of speed, ignoring traffic signs and signals and the lights and siren of the police cruiser. The evidence also supports that in an effort to elude the police, defendant drove the wrong way down a highway ramp at excessive speeds, hitting and instantly killing the victim in a head-on collision. In light of this evidence, defendant has not shown that his convictions for involuntary manslaughter and fleeing and eluding police were against the great weight of the evidence so as to result in plain error affecting his substantial rights. *Musser, supra* at 218.

Defendant also argues that he was improperly sentenced. Specifically, defendant opines that Offense Variable (OV) 5 was incorrectly scored because the evidence did not show the requisite psychological harm to the victim's family or that any member of the victim's family had sought psychological treatment. Further, regarding OV 19, defendant asserts that, while the trial court found him guilty of fleeing and eluding, it made no finding with respect to whether this constituted an interference with the administration of justice as required by the sentencing

guidelines and by case law precedent. Finally, defendant alleges he was sentenced as a habitual offender without substantiation or foundation.

Defendant did not object below to the scoring of OV 19 or to being sentenced as an habitual offender. Therefore, those arguments are not preserved for review. Defendant arguably objected to the scoring of OV 5, thus preserving a challenge to that scoring for appellate review.

This Court reviews the trial court's application of the sentencing guidelines de novo but reviews a preserved challenge to the scoring of a sentencing variable for an abuse of discretion. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). See also *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). An unpreserved objection to the scoring of offense variables is reviewed for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The guidelines provide that fifteen points may be scored for OV 5 "if the serious psychological injury to the victim's family may require professional treatment," even though "the fact that treatment has not been sought is not conclusive." MCL 777.35(2). At defendant's sentencing, the prosecutor advised the trial court that the victim's aunt required psychological treatment as a result of the victim's death. This evidence was sufficient to allow the trial court to assign fifteen points under OV 5 because it was evidence of serious psychological injury to the victim's family.

Further, the trial court did not err in scoring ten points for OV 19 to reflect that defendant interfered with or attempted to interfere with the administration of justice, MCL 777.49, because the evidence showed that he attempted to elude the police by fleeing onto the highway. MCL 777.49(c); *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). From the testimony of Officer Lapham, it could be inferred that defendant, realizing that Lapham was trying to stop him, fled the police. This evidence was sufficient to support the scoring decision. See *Barbee*, *supra* at 487 n 4; 681 NW2d 348 (2004) (noting with apparent approval this Court's holding in *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003), "that it was proper for the trial court to score ten points under OV 19 for defendant's conduct in attempting to flee from the police").

Regarding the fourth habitual offender designation, the record reflects defendant's convictions for at least four prior offenses. Defendant does not offer any evidence disputing these convictions. Under MCL 769.13(5), the existence of the defendant's prior convictions must be determined by the trial court at sentencing or at a separate hearing for that purpose before sentencing. *People v Zinn*, 217 Mich App 340, 345, 551 NW2d 704 (1996). The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including information contained in the presentence report. MCL 769.13(5)(c). In this case, the presentence report listed defendant as a habitual offender and included details of defendant's prior convictions. Moreover, during the trial and the sentencing hearing, the trial court explicitly recognized defendant as a habitual offender. Therefore, the trial court met the requirements of MCL 769.13(5)(d) in sentencing defendant as a fourth habitual offender.

Finally, defendant argues that defense counsel's failure to object to the initial overcharge and regarding the verdict against the great weight of the evidence, and the lack of attention accorded defendant by his counsel constituted ineffective assistance of counsel.

Defendant did not move for an evidentiary hearing or a new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court's review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The determination as to whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo. *Id.*

"Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[T]o overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* "Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.* at 663-664.

Defendant has not shown that he was deprived of the effective assistance of counsel. Defendant bases his claims of ineffective assistance on counsel's failure to properly object to the aforementioned alleged errors. However, as set forth above, no errors occurred. Accordingly, defendant's counsel was not ineffective for failing to address these alleged errors. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Finally, defendant suggests that he is entitled to a presumption of prejudice because defense counsel allegedly failed to spend adequate time meeting with him. However, these claimed deficiencies are not apparent from the record and, thus, are not subject to review. *See People v Odom*, 276 Mich App 407, 417, 740 NW2d 557 (2007). Moreover, although defendant asserts he did not have adequate opportunity to meet with defense counsel, he does not explain how he was prejudiced by counsel's failure to meet with him more extensively, or how more attention could have benefited his case. Absent a showing of prejudice, this claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ Christopher M. Murray  
/s/ Jane E. Markey  
/s/ Kurtis T. Wilder